

No. 485494

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

SCOTT MCCOMB, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
THE HONORABLE JERRY COSTELLO

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The Court Improperly Sentenced Mr. McComb Using An Incorrect Offender Score.
- B. Appellate costs should not be imposed on Mr. McComb.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

- A. Does a plea agreement based on a miscalculated offender score require a new sentencing hearing at which the court must determine the correct offender score and resultant standard range sentence?
- B. Should the state substantially prevail on appeal, should this Court deny appellate costs if the State submits a cost bill?

II. STATEMENT OF FACTS

Pierce County Prosecutors charged Scott McComb (McComb) with crimes related to his unlawful possession and use of a Visa debit card belonging to Robert Radcliff. He was charged with identity theft in the first degree, possessing stolen property in the second degree, theft in the second degree, and bail jump. (CP 8-10).

McComb negotiated an agreement with the State and pleaded guilty to the charges. (CP 31-39). As apart of that

agreement, both he and his attorney signed a “Stipulation on Prior Record and Offender Score (Plea of Guilty). (CP 42-44; Appendix A). That document set out 7 prior felony convictions. A conviction for a 1993 out of state (Nevada) crime with a sentence date of 1993 was scratched out and unscored. (CP 43).

For the current charges on the stipulated agreement the identity theft charge was scored a “1”, the possession of stolen property was scored as a “2”, the theft in the second degree was scored as a “2” and the bail jump was scored as a “1”. (CP 42). Although the total, as stipulated, actually added up to a score of “8” for the identity theft count, the stipulation shows an offender score of “9+”.

The unstipulated conviction from the 1993 Nevada charge was included on the judgment and sentence offender score chart. (CP 66). There is no evidence in the record substantiating the out of state conviction. McComb was sentenced based on an offender score of “9+” and sentenced to 63 months of incarceration on the identity theft count. The other counts were run concurrently. (CP 66; 12/3/15 RP 19).

The sentencing court declined to impose any legal financial obligations beyond those required by statute. (CP 66-67). The

court specifically found that Mr. McComb did not have the likely ability to pay non-mandatory obligations. (12/3/15 RP 19-20).

Mr. McComb makes this timely appeal. (CP 79).

III. ARGUMENT

A. The Court Improperly Sentenced Mr. McComb Using An Incorrect Offender Score.

An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Ross*, 152 Wn.2d 220, 229, 95 P3d 1225 (2004). Where a defendant has been erroneously sentenced, the case is remanded to the sentencing court for resentencing. *Id.*

The Sentencing Reform Act of 1981, chapter 9.94A RCW requires the sentencing court to calculate a defendant's offender score by the sum of points accrued under RCW 9.94A.525. The sentencing court bears the responsibility to determine the correct offender score and sentencing range. *State v. Wiley*, 124 Wn.2d 679, 682, 880 P.2d 983 (1994). A sentencing court may rely on a defendant's stipulation to prior criminal history, but a sentence based on an incorrectly calculated offender score is a sentence in excess of that authorized by statute. *State v. Malone*, 138 Wn.App. 587, 593, 157 P.3d 909 (2007).

A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *State v. Eilts*, 94 Wn.2d 489, 495, 617 P.2d 993 (1980)(*superseded by statute/rule on other grounds by State v. Barr*, 99 Wn.2d 75, 658 P.2d 1247 (1983)). Even where a defendant pleads guilty, he cannot agree to a sentence in excess of the authority provided by statute. *In re Personal Restraint of Gardner*, 94 Wn.2d 504, 507, 617 P.2d 1001(1980). Where a sentence has been imposed for which there is no authority in law, the trial court has the power and the duty to correct the erroneous sentence when the error is discovered. *In re Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

Here, McComb initially stipulated to an incorrect score. Based on the points agreed to in the stipulation, the sum is a total of “8” rather than “9” for the identity theft count. The score was added incorrectly.

The judgment and sentence exacerbated the problem because it included a Nevada conviction from 1993. McComb had not stipulated to that conviction and thus, the State bore the burden to prove the existence of that conviction by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909-910, 287 P.3d 584 (2012); RCW 9.94A.500(1). Here, the State failed to provide any

evidence of that alleged prior conviction. Where the State fails to meet the preponderance of the evidence standard, the minimum requirements of due process are not met. *Id.* at 912. Adding the alleged conviction as a prior crime was error.

“[A] sentence which is predicated upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” *State v. Wilson*, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010). In this case, the improper inclusion of the 1993 Nevada conviction, which raised the offender score, is a legal error. *Id.* at 689.

McComb respectfully asks this Court to remand to the trial court for a correction of his offender score and resultant sentence.

B. This Court Should Not Award Appellate Costs.

Should this Court reject Mr. McComb's argument on appeal, he asks that this Court issue a ruling denying costs on appeal due to his continued indigency. RAP 14.2 authorizes the State to request the Court to order an appellant to pay appellate costs if the State substantially prevails on appeal. The appellate courts are authorized to deny or award the State the costs of appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300

(2000); *State v. Sinclair*, 192 Wn.App. 380, 382, 367 P.3d 612 (2016). The indigent appellant must object before the Court has issued a decision terminating review to a cost bill that might eventually be filed by the state. *Sinclair*, 192 Wn.App. at 395-394.

RCW 10.73.160(1) permissively authorizes any court to require payment of appellate costs: “The court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (Emphasis added). The statute does not provide guidance as to how the courts are to exercise the permissive discretion. *Sinclair*, 192 Wn.App. at 389. The *Sinclair* Court characterized it: “exercising discretion means making an individualized inquiry.” *Sinclair*, 192 Wn.App. at 392. A defendant’s ability or inability to pay appellate costs is a significant factor to consider when deciding whether to impose such costs. *Sinclair*, 192 Wn.App. at 382. If a defendant is indigent and lacks the ability to pay, an appellate court should deny an award of costs to the State. *Sinclair*, 192 Wn.App. at 382.

The Washington Supreme Court recognized the widespread “problematic consequences” legal financial obligations (LFOs) inflict on indigent criminal defendants, which include an interest rate of 12 percent, court oversight until LFOs are paid, and long term court

involvement, which inhibits re-entry into the community and increases the chance of recidivism. *Blazina*, 182 Wn.2d at 836.

In *Sinclair*, the defendant was indigent, aged, and facing a lengthy prison sentence. The Court determined there was no realistic possibility he could pay appellate costs and denied award of those costs. *Sinclair*, 192 Wn.App. at 392.

Here, McComb is 50 years old, unemployed, and without assets. (12/3/15 RP 13). He was in the process of applying for disability because he had broken his back resulting in 67% disability. (12/3/15 RP 13). Moreover, the trial court found that it was unlikely Mr. McComb had the likely future ability to pay costs beyond the minimum mandated by statute.

Mr. McComb respectfully asks this Court to consider his impoverishment and deny the award of costs should the state substantially prevail on appeal and submit a cost bill.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. McComb asks this Court to remand to the trial court for a resentencing, correcting his offender score and resentencing within the low end of the standard range for that corrected score.

Dated this 22nd day of September, 2016.

Respectfully submitted,

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APPENDIX A



13-1-01257-1 44367056 STPPR 03-26-15

FILED
IN OPEN COURT
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MAR 26 2015

Pierce County, Clerk
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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 13-1-01257-1

VS.

SCOTT WILLIAMS MCCOMB,

STIPULATION ON PRIOR RECORD
AND OFFENDER SCORE
(Plea of Guilty)

Defendant.

Upon the entry of a plea of guilty in the above cause number, charge IDENTITY THEFT IN THE FIRST DEGREE; POSSESSING STOLEN PROPERTY IN THE SECOND DEGREE; THEFT IN THE SECOND DEGREE; BAIL JUMPING, the defendant SCOTT WILLIAMS MCCOMB, hereby stipulates that the following prior convictions are His complete criminal history, are correct and that He is the person named in the convictions. The defendant further stipulates that any out-of-state convictions listed below are equivalent to Washington State felony convictions of the class indicated, per RCW 9.94A.360(3)/9.94A.525:

ALL CURRENT CONVICTIONS, THIS CAUSE NUMBER

Count	Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J Adult Juv	Type of Crime	Class	Score by Ct	Felony or Misdemeanor
I	ID THEFT 1 st		PIERCE, WA	8/16/12 8/18/12	A	NV	B	I:0 II: IV:1	FELONY
II	PSP 2 nd		PIERCE, WA	8/16/12 8/18/12	A	NV	C	I:1 II:0 III: IV:1	FELONY
III	THEFT 2 nd		PIERCE, WA	8/16/12 8/18/12	A	NV	C	I-II:1 III:0 IV:1	FELONY
IV	BAIL JUMPING		PIERCE, WA	4/10/14	A	NV	C	I: III:1 IV:0	FELONY

[] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

STIPULATION ON PRIOR
RECORD AND OFFENDER SCORE -1
jsprior-pleadot

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

OTHER CURRENT CONVICTIONS, OTHER CAUSE NUMBERS (if any)
 [X] None Known or Claimed, or:

PRIOR CONVICTIONS INCLUDED IN OFFENDER SCORE (if any)
 [] None Known or Claimed, or:

Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J Adult Juv	Type of Crime	Class	Score by Ct	Felony or Misdemeanor
UNKNOWN	2/28/00	DOUGLAS, NV		A	NV	C	1	FELONY
VUCSA POSSESSION - MEH	2/28/00	DOUGLAS, NV		A	NV	C	1	FELONY
FORGERY	1/14/05	SNOHOMISH, WA	10/31/04	A	NV	C	1	FELONY
TMV WOP 2 nd	4/13/05	SNOHOMISH, WA	1/21/05	A	NV	C	1	FELONY
FORGERY	4/28/06	SNOHOMISH, WA	1/28/05	A	NV	C	1	FELONY
FIN FRD PAYMENT INSTR	4/28/06	SNOHOMISH, WA	1/28/05	A	NV	C	1	FELONY
AGG ID THEFT	6/21/07	US FED DIST CT, WA	10/30/06	A	NV	C	1	FELONY
AGG SOC SEC	6/21/07	US FED DIST CT, WA	10/30/06	A	NV	C	1	FELONY

The defendant stipulates that the above criminal history and scoring are correct, producing an offender score as follows, including current offenses, and stipulates that the offender score is correct:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	9+	IV	63-84 MONTHS	NONE	63-84 MONTHS	10 YRS
II	9+	I	22-29 MONTHS	NONE	22-29 MONTHS	5 YRS
III	9+	II	43-59 MONTHS 22-29	NONE	43-59 MONTHS 22-29	5 YRS
IV	9+	I	22-29 MONTHS 51-60	NONE	22-29 MONTHS 51-60	5 YRS

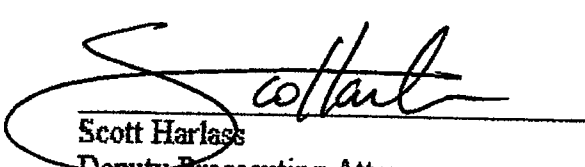
* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom. See RCW 46.61.520, (JP) Juvenile present.

The defendant further stipulates:


- 1) Pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), defendant may have a right to have factors that affect the determination of criminal history and offender score be determined by a jury beyond a reasonable doubt. Defendant waives any such right to a jury determination of these factors and asks this court to sentence according to the stipulated offender score set forth above.
- 2) That if any additional criminal history is discovered, the State of Washington may resentence the defendant using the corrected offender score without affecting the validity of the plea of guilty;
- 3) That if the defendant pled guilty to an information which was amended as a result of plea negotiation, and if the plea of guilty is set aside due to the motion of the defendant, the State of Washington is permitted to refile and prosecute any charge(s) dismissed, reduced or withheld from filing by that negotiation, and speedy trial rules shall not be a bar to such later prosecution;

- 4) That none of the above criminal history convictions have "washed out" under RCW 9.94A.360(3)/9.94A.525 unless specifically so indicated. If sentenced within the standard range, the defendant further waives any right to appeal or seek redress via any collateral attack based upon the above stated criminal history and/or offender score calculation.

Stipulated to this on the 26th day of March, 2015.


Scott Harlass
Deputy Prosecuting Attorney
WSB # 44131


SCOTT WILLIAMS MCCOMB


JAMES A SCHOENBERGER
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na

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury that on September 22, 2016, I mailed to the following, by USPS first class mail, postage prepaid, or provided electronic service by prior agreement between the parties, a true and correct copy of the appellant's opening brief:

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TROMBLEY LAW OFFICE

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